

Gallagher v Incorporated Vil. of Rockville Ctr.

2012 NY Slip Op 33250(U)

November 29, 2012

Sup Ct, Nassau County

Docket Number: 8654/11

Judge: Randy Sue Marber

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE

TRIAL/IAS PART 14

_____ X

JOHN GALLAGHER,

Index No.: 008654/11
Motion Sequence...01
Motion Date...09/25/12

Plaintiff,

-against-

INCORPORATED VILLAGE OF ROCKVILLE
CENTRE,

Defendant.

_____ X

Papers Submitted:

- Notice of Motion.....X
- Affirmation in Opposition.....X
- Affirmation in Reply.....X

Upon the foregoing papers, the branch of the Plaintiff's motion seeking an order (i) compelling the Defendant to produce its Superintendent of Public Works, Harry L. Weed, II, for a further deposition with respect to questions based solely on his diary which was provided to the Plaintiff's counsel in June, 2012; (ii) compelling the Defendant to produce its Foreman, Peter Schalmenbeger for a court ordered deposition including questions based on his diary which was provided to the Plaintiff's counsel in June, 2012; (iii) vacating the Certification Order dated July 16, 2012, or, in the alternative, extending the Plaintiff's

time to file the Note of Issue, is determined as hereinafter provided.

This action arises out of a slip and fall accident on snow and ice that occurred on January 4, 2011 at 3:30 p.m. in the Defendant's parking lot # 26. Counsel for the Plaintiff states that, at the deposition of the Superintendent, Mr. Weed, conducted on February 2, 2012, Mr. Weed testified that the Defendant had contracts with three (3) different snow removal companies for the Defendant's parking lots, including parking lot # 26. Mr. Weed testified that either his diary or the diary of his foreman, Mr. Schalmenbeger, would have the snow and ice removal records for the Defendant's parking lot # 26 through January 4, 2011, the date of the Plaintiff's accident.

Following the deposition of Mr. Weed, on or about February 12, 2012, counsel for the Plaintiff served a Notice for Discovery and Inspection for records including Mr. Schalmenbeger's diary and records.

On February 28, 2012, a Compliance Conference was held whereat a So Ordered Stipulation was executed ordering that the Defendant was to respond to the Plaintiff's Notice for Discovery and Inspection noted above by April 2, 2012. The Stipulation further ordered that the issue of a further deposition of the Defendant, Mr. Weed, would be discussed at the next conference.

On April 18, 2012, this matter appeared on the Court's Certification Conference Calendar. By this date, the Defendant had failed to comply with the So Ordered Stipulation of February 28th and the issue of the further deposition had not been resolved.

The Certification Conference was adjourned to June 13, 2012.

At the June 13th Certification Conference, the Court So Ordered yet another Stipulation wherein the Defendant was ordered to provide responses to all outstanding discovery within twenty days thereof and the Certification Conference was adjourned to July 16, 2012.

Prior to the July 16th Certification Conference, in June, 2012, the Plaintiff received a copy of Mr. Weed's diary. (*See Weed Diary*, attached to the Plaintiff's Notice of Motion as Exhibit "D") At or about the same time, the Plaintiff also received a copy of Mr. Schalmenebeger's diary. (*See Schalmenebeger Diary*, attached to the Plaintiff's Notice of Motion as Exhibit "E") Notably, and as stated by the Plaintiff's counsel, Mr. Weed's diary is missing entries for the dates January 1, 2011 and January 2, 2011, two days before the Plaintiff's accident. Additionally, the only entries for Mr. Schalmenebeger's diary produced by the Defendant were December 27th, 29th, 30th and 31st. Missing from the diary were the entries for December 28, 2010 and January 1st through January 4, 2011, the date of the Plaintiff's accident. (*See Exhibits "D" and "E"*, respectively)

This case was certified ready for trial on July 16, 2012.

In the instant application, the Plaintiff's counsel requests a further deposition of Mr. Weed with respect to the entries in his diary in connection with the snow and ice removal efforts as a result of a snow blizzard on December 26, 2010. Moreover, counsel requests a further deposition based upon an entry on January 4, 2011 (the same date as the

Plaintiff's accident) approximately six hours earlier which stated that a snow removal crew member witnessed a slip and fall accident of another person at parking field # 6, which is undisputedly approximately 1/4 -1/2 of a mile from parking field # 26 where the subject accident occurred.

Counsel for the Plaintiff also requests a court-ordered deposition of Mr. Schalmenbeger based upon his diary entries relating to snow and ice removal from December 26, 2010 through December 30, 2012. Counsel further requests to question the foreman based upon any snow and ice removal efforts from January 1, 2011 through January 4, 2011, the date of the Plaintiff's accident, in connection with parking field # 26.

In opposition, counsel for the Defendant first points out that the relief requested in the Plaintiff's motion was specifically addressed by counsel before Justice Marber at the Certification Conference held on July 16, 2012. Defendant's counsel states that at that conference Plaintiff's counsel noted the snow and ice removal crew member who witnessed another accident in parking field # 6. Counsel contends that after hearing this argument, Justice Marber "made the determination that no further depositions were required and that none would be ordered". (*See* Defendant's Counsel's Affirmation in Opposition, ¶ 6)

Counsel for the Defendant further posits that a further deposition of Mr. Weed or a deposition of Mr. Schalmenbeger as additional testimony or new testimony would only be cumulative, duplicative and unduly burdensome to the Defendant.

Notably, the opposition papers are devoid of any explanation regarding the

missing diary entries that were noted by the Plaintiff's counsel in his moving papers.

The Court agrees with the Defendant that a further deposition of Mr. Weed or a deposition of Mr. Schalmenbeger regarding the slip-and-fall accident that occurred six hours prior to the subject accident and in a different parking field is not warranted. The information sought by the Plaintiff's counsel is irrelevant and appears to be a "fishing expedition". However, the Plaintiff is entitled to all of the diary entries from the date of the blizzard, December 26, 2010, up to and including January 4, 2011, the date of the Plaintiff's accident. Any information regarding snow and ice removal during this time period regarding parking field # 26 may be relevant and/or necessary in order for the Plaintiff to prove notice, actual or constructive, which is an element of the Plaintiff's claims. In the alternative, if said documents do not exist or have been otherwise lost or destroyed, the Plaintiff is entitled to an affidavit representing same.

Accordingly, it is hereby

ORDERED, that the branch of the Plaintiff's motion seeking an order compelling the Defendant to produce its Superintendent of Public Works, Harry L. Weed, II, for a further deposition with respect to questions based solely on his diary which was provided to the Plaintiff's counsel in June, 2012, is **DENIED**; and it is further

ORDERED, that the branch of the Plaintiff's motion seeking an order compelling the Defendant to produce its Foreman, Peter Schalmenbeger, for a court ordered deposition including questions based on his diary which was provided to the Plaintiff's

counsel in June, 2012, is **DENIED**; and it is further


ORDERED, that the branch of the Plaintiff's motion seeking an order extending the Plaintiff's time to file the Note of Issue, is **GRANTED**, and the Plaintiff's time to file the Note of Issue is hereby extended up to and including January 11, 2013. If the Plaintiff does not file a Note of Issue by January 11, 2013, this action is deemed dismissed without further order of the Court pursuant to CPLR § 3216; and it is further

ORDERED, that counsel for the Defendant shall serve a copy of the diary entries of the Superintendent of Public Works, Harry L. Weed, for the dates January 1, 2011 and January 2, 2011, and a copy of the diary entries of the Foreman, Peter Schalmenbeger, for the dates January 1, 2011, January 2, 2011, January 3, 2011 and January 4, 2011 upon counsel for the Plaintiff within fourteen (14) days of the date of this Order, or shall provide an affidavit stating that the documents do not exist or have otherwise been lost or destroyed.

All applications not specifically addressed herein are **DENIED**.

This constitutes the decision and order of the Court.

DATED: Mineola, New York
November 29, 2012



Hon. Randy Sue Marber, J.S.C.

ENTERED
DEC 04 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE